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IN THE

Supreme Court of the United States

October Term, 1965

No. 364

ROBERT FROEHLICH and
ROBERT FROEHLICH FUNDING COMPANY,
Petitioners,

against

THE DISTRICT JUDGES CONSTITUTING THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK and ROBERT M. MORGANTHAU, as UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDICES

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THE DISTRICT JUDGES CONSTITUTING THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK and ROBERT M. MORGANTHAU, as UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States

Petitioners pray that a Writ of Certiorari issue to review a decision and order of the United States Court of Appeals for the Second Circuit, which denied petitioners' application for a Writ of Prohibition for lack of jurisdiction.

The decision of the Court of Appeals, dated May 17, 1965 is not yet reported. A copy is annexed as Appendix A.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USC §1254 (1).

Question Presented

May a Court of Appeals issue a Writ of Prohibition directed to the District Judges of the United States District Court and the United States Attorney for that District, restraining and prohibiting them from proceeding to trial upon an invalid indictment?

This case presents special circumstances warranting the grant of the writ of certiorari (*Fay* v. *Noia*, 372 U. S. 391), and deals with a Federal question of continuing importance (*Yellen* v. *United States*, 374 U. S. 109). The Court of Appeals for the Second Circuit held that it lacked jurisdiction to issue such writ. This is in conflict with other Circuits (cf. *Gladstein* v. *McLoughlin*, 230 Fed. 2d 762 [9 Cir.]).

Amendments to United States Constitution

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Statutes Involved

28 USC §1651(a):

"(a) The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and acceptable to the uses and principles of law."

18 USC §1014:

"Who so knowingly makes any false statement or report or wilfully overvalues any land, property or security, for the purposes of influencing in any way the action of the Reconstruction Finance Corporation, the Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, The Secretary of Agriculture acting through the Farmers' Home Administration, any federal intermediate credit

bank, or the Federal Farm Mortgage Corporation, or any division, officer, or employee thereof, or of any corporation organized under Sections 1131-1134M of Title 12, or in which a protection credit corporation holds stock, or of any regional agricultural credit corporation, established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal Land Bank, a joint-stock land bank, a National Farm Loan Association, or a Federal Reserve Bank, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 752, amended May 24, 1949, c. 139, §21, 63 Stat. 92."

Federal Rule of Criminal Procedure

Rule 7(c)

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that

he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

Statement of the Case

The petitioners are duly licensed real estate brokers who have been engaged in their business for many years and have enjoyed a good reputation, standing and confidence of the interested public.

The respondents are the District Judges who constitute the United States District Court for the Southern District of New York and the United States Attorney for the Southern District of New York.

On August 3, 1964 an indictment was filed in the District Court for the Southern District of New York against the petitioners, charging them "with making false statements to the Washington Heights Federal Savings & Loan Association in violation of Title 18, United States Code, §1014". A copy of the indictment is annexed hereto as Appendix B.

The petitioners pleaded not guilty and moved to dismiss the indictment on the grounds that it fails to allege the commission of an offense against the United States;

it is ambiguous, vague and indefinite; it is improper and insufficient in form and substance; each of the purported counts is invalid and in violation of the Fifth and Sixth Amendments to the Federal Constitution and Rule 7(c) of the Rules of Criminal Procedure; and fails to apprise the petitioners of the nature of the charge sufficient to enable them to defend themselves or to plead former conviction or acquittal in bar of a subsequent prosecution.

District Judge Thomas F. Murphy denied the petitioner company's motion in an opinion and order dated October 27, 1964, a copy of which is annexed as Appendix C. United States District Judge Inzer B. Wyatt denied the motion of the individual petitioner by reference to Judge Murphy's aforementioned order; a copy of Judge Wyatt's order is annexed as Appendix D.

The petitioners thereupon moved the United States Court of Appeals for the Second Circuit on the 17th day of May, 1965 for a Writ of Prohibition directed to the District Judges and the United States Attorney for the Southern District, restraining, and prohibiting them from proceeding to trial against the petitioners upon the aforementioned indictment.

The Court of Appeals denied petitioners' application solely upon the ground that it did not possess jurisdiction to hear such an application.

Jurisdiction of the Court of Appeals

The Court of Appeals may issue the writ sought in aid of its appellate jurisdiction and has jurisdiction to grant the writ under Title 28 U. S. C. §1651(a), which provides:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In *Ex Parte U. S.*, 287 U. S. 241, 246, this Court held:

> "McClellan v. Carland, 217 U. S. 268, 280, 30 S. Ct. 501, 504, 54 L. Ed. 762, laid down the general rule applicable both to this court and to the Circuit Courts of Appeals, that the power to issue the writ under R. S. §716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.'"

In this case the ordinary remedy by appeal is not adequate. In such situation a Court of Appeals should exercise its power and issue the writ. In *Minnesota & Ontario Paper Co.* v. *Molyneaux*, 70 Fed. 2d 545, CCA, 8 Cir., 1934, the court said on page 546:

> "Whether such appellate jurisdiction exists is determined, not alone by the pendency of an appeal, but by whether the proceeding in the lower court to be affected by the writ is 'within the appellate jurisdiction of the higher court.' Ex parte United States, 287 U. S.

241, 246, 53 S. Ct. 129, 130, 77 L. Ed. 283; McClellan v. Carland, 217 U. S. 268, 280, 30 S. Ct. 501, 54 L. Ed. 762. Obviously, the proceeding here in the lower court is within the appellate jurisdiction of this court because it is an ordinary receivership action. Where such appellate jurisdiction exists, the necessary original writs may be entertained for any purpose necessary to protect the full exercise of that jurisdiction. One situation classed within such protection of appellate jurisdiction is where the right of appeal exists but because of the presence of ' "circumstances imperatively demanding" a departure from the ordinary remedy by * * * appeal' (Whitney v. Dick, 202 U. S. 132, 140, 26 S. Ct. 584, 588, 50 L. Ed. 963) is necessary. In such situation, the writs may be employed 'as an auxiliary process, and * * * as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways'."

It had been suggested by Circuit Judge Marshall at the argument of the application before the Second Circuit Court of Appeals that the granting of the writ to prevent the trial of petitioners upon the defective indictment would be destructive of that court's jurisdiction, not in aid of it. This Court has already laid that argument to rest in *McClellan* v. *Carland*, 217 U. S. 267, 278, 54 L. ed. 762 (1910) where it said:

"It is further objected that the circuit court of appeals had no jurisdiction to issue the writ of mandamus, as that writ could only be issued in aid of the appellate jurisdiction of the circuit court of appeals; and, it is contended, as that court had no jurisdiction of the suit when the application for mandamus was filed, it ought to have been dismissed. Section 12 of

the court of appeals act declares that the circuit court of appeals shall have the powers specified in §716 of the Revised Statutes of the United States. That section we have already had occasion to quote, and when read in connection with §12 of the court of appeals act, it gives to the circuit court of appeals the authority, as this court has, to issue writs of scire facias, and all writs not specially provided for by statute, and necessary for the exercise of the court's jurisdiction and agreeable to the usages and principles of law."

Thereafter, in *Ex Parte U. S.*, 287 U. S. 241, 246, 77 Law. Ed. 283, 285 (1932), this court said:

"In Marbury v. Madison, 1 Cranch, 137, 175, 2 L. ed. 60, 72, it was held that to warrant the issue of a mandamus by this court, in cases where original jurisdiction had not been conferred by the Constitution (see Kentucky v. Dennison, 24 How. 66, 97, 16 L. ed. 717, 725), it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable the court to exercise its appellate jurisdiction. McClellan v. Carland, 217 U. S. 268, 280, 54 L. ed. 762, 766, 30 S. Ct. 501, laid down the general rule applicable both to this court and to the circuit courts of appeals, that the power to issue the writ under Rev. Stat. §716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.' See also Delaware, L. & W. R. Co. v. Rellstab, 276 U. S. 1, 5, 72 L. ed. 439, 441, 48 S. Ct. 203; Re Babcock (C. C. A. 7th) 26 F. (2d) 153, 155; Barber Asphalt Paving Co. v. Morris (C. C.) 67 L. R. A. 761, 66 C. C. A. 55, 132 Fed. 945, 952-956."

A trial court lacks jurisdiction to proceed where as here the indictment is defective (*Ex Parte Bain*, 121 U. S. 1, 1886).

In *Application of Boyer*, 226 F. Supp. 888 (U. S. D. C., New Jersey, 1963), the principle was phrased as follows:

> "The sole question to be determined herein is not whether the trial and sentencing court committed error of law while acting within its jurisdiction or whether the indictment would have been vulnerable to direct attack, but whether the indictment was fatally defective so that it could not be amended and subsequently deprived the trial and sentencing court of jurisdiction."

The Defective Indictment

The indictment is as follows:

The Grand Jury charges:

1. At all times hereinafter set forth in this Indictment, the defendant Robert Froehlich was the president of the defendant Robert Froehlich Funding Company.

2. At all times hereinafter set forth in this Indictment, Robert Froehlich Funding Company was a corporation organized and existing under and by virtue of the laws of the State of New York.

3. At all times hereinafter set forth in this Indictment, Washington Heights Federal Savings and Loan Association was a federal savings and loan association with its principal office within the Southern District of New York.

4. On or about the dates hereinafter set forth, in the Southern District of New York, Robert Froehlich and

Robert Froehlich Funding Company, the defendants, unlawfully, wilfully and knowingly, and for the purpose of influencing the action of Washington Heights Federal Savings and Loan Association, upon an application for a mortgage loan dated as hereinafter set forth and bearing the signature of the defendant Robert Froehlich and submitted on behalf of the defendant Robert Froehlich Funding Company to the said Washington Heights Federal Savings and Loan Association, did make a false statement and cause a false statement to be made on the said mortgage loan application, to wit, that the purchase price of the property concerning which the said application was submitted, was as hereinafter set forth, whereas, in truth and in fact, as the defendants then and there well knew, the actual purchase price of the said property was substantially less than shown on the said application:

Count	*Date*	*Date of Application*	*Purchase Price on Application*
1	October 30, 1959	October 30, 1959	$24,500
2	November 13, 1959	November 13, 1959	21,000
3	November 13, 1959	November 13, 1959	23,200
4	September 24, 1959	September 24, 1959	16,000
5	September 17, 1959	September 17, 1959	19,200
6	October 6, 1959	Undated	26,500
7	September 8, 1959	September 8, 1959	21,000
8	August 25, 1959	Undated	21,000
9	October 6, 1959	Undated	15,990
10	October 30, 1959	October 30, 1959	20,500
11	November 13, 1959	November 13, 1959	26,300
12	September 24, 1959	September 24, 1959	22,000
13	September 8, 1959	September 8, 1959	20,000

(Title 18, United States Code, Sections 1014 and 2)

COUNTS FOURTEEN THROUGH TWENTY-FIVE

The Grand Jury further charges:

5. The allegations of paragraphs 1, 2 and 3 of this Indictment are hereby alleged and realleged for Counts Fourteen through Twenty-Five inclusive, as if more particularly stated therein.

6. From on or about September 1, 1959, to on or about March 1, 1960, in the Southern District of New York, Robert Froehlich and Robert Froehlich Funding Company, the defendants, unlawfully, wilfully and knowingly, and for the purpose of influencing the action of Washington Heights Federal Savings and Loan Association with respect to a mortgage loan granted to the said Robert Froehlich Funding Company on or about the dates hereinafter set forth, did make a false statement and cause a false statement to be made, on a document purporting to be a contract of sale and submitted by the defendant Robert Froehlich Funding Company to the said Washington Heights Federal Savings and Loan Association, and dated as hereinafter set forth, to wit, that the purchase price of the property concerning which the said contract was submitted, was as hereinafter set forth, whereas in truth and in fact, as the defendants then and there well knew, the actual purchase price of the said property was substantially less than shown on the said document:

Count	*Date of Mortgage*	*Date of Contract*	*Price Shown on Contract*
14	January 14, 1960	October 28, 1959	$24,500
15	February 3, 1960	November 11, 1959	21,000
16	January 21, 1960	January 13, 1960	23,200
17	November 24, 1959	September 23, 1959	16,000
18	December 8, 1959	September 17, 1959	19,200

19	November 20, 1959	October 5, 1959	26,500
20	November 10, 1959	November 12, 1959	21,000
21	October 1, 1959	June 3, 1959	21,000
22	December 8, 1959	August 6, 1959	17,900
23	January 21, 1960	September 24, 1959	20,500
24	January 26, 1960	November 11, 1959	26,300
25	November 27, 1959	August 20, 1959	22,000

(Title 18, United States Code, Sections 1014 and 2.)

COUNTS TWENTY-SIX THROUGH THIRTY-TWO

The Grand Jury further charges:

7. The allegations of paragraphs 1, 2 and 3 of this Indictment are hereby alleged and realleged for counts Twenty-six through Thirty-two inclusive, as if more particularly stated therein.

8. From on or about September 1, 1959, to on or about March 1, 1960, in the Southern District of New York, Robert Froehlich and Robert Froehlich Funding Company, the defendants, unlawfully, wilfully and knowingly and for the purpose of influencing the action of Washington Heights Federal Savings and Loan Association with respect to a mortgage loan granted to the said Robert Froehlich Funding Company on or about the dates hereinafter set forth, did make a false statement and cause a false statement to be made, on a document purporting to be a bona fide credit report and submitted by the said Robert Froehlich Funding Company to the said Washington Heights Federal Savings and Loan Association and dated as hereinafter set forth, to wit, that the salary of the persons hereinafter set forth was reported by the credit report company whose report the said document

purported to be, to be as hereinafter set forth, whereas, in truth and in fact, as the defendants then and there well knew, the salary of the said persons was not so reported by the said credit report company but was actually reported to be and actually was substantially less than as shown on the said document:

Count	*Date of Mortgage*	*Date of Document Purporting To Be Credit Report*	*Person*	*Salary Shown on Document Purporting To Be Credit Report*
26	January 14, 1960	November 27, 1959	Vincent A. Cipriani	$8900
27	February 3, 1960	November 27, 1959	Frank W. Coffman	$7900
28	January 21, 1960	December 10, 1959	Karl Gaertner	$8850
29	December 8, 1959	October 30, 1959	Arthur Getman	$6900
30	November 20, 1959	October 7, 1959	Kenneth Hartbrodt	$9240
31	January 21, 1960	September 25, 1959	Robert Martorana	$7600
32	October 27, 1959	July 23, 1959	Stephen Schembri	$7800

(Title 18, United States Code, Sections 1014 and 2)

Argument

The charging portion of the indictment consists of *thirty-two* counts *of one line each.* No count incorporates by reference any other part of the indictment. No count refers to any other count, except that the descriptions of the parties in paragraphs 1, 2 and 3 are realleged by paragraph 5 for counts fourteen to twenty-five and by paragraph 7 for counts twenty-six through thirty-two.

Petitioners contend that none of the one-line counts sets forth the elements necessary to charge or constitute the offense under Title 18, U. S. Code, §1014, under which they were purportedly drawn.

The rule is general that each and every element of an offense, as fixed by the statute creating the crime, must be charged in the indictment (*U. S.* v. *Standard Brands,* 251 U. S. 210).

An indictment which fails to allege any material ingredient or matters of substance of the crime is fatally defective (*Michever* v. *U. S.,* 170 Fed. 2d 973).

Omission of any necessary averment in the indictment is a defect that cannot be ignored (*Mercantile Co.* v. *U. S.,* 236 U. S. 531).

A. No more than one offense may be alleged in any one count.

It is elementary that each count of an indictment must charge no more than one offense or be subject to dismissal (*U. S.* v. *J. Tirocchi & Sons, Inc.,* D. C. R. I., 1960, 187 F. Supp. 778, 780). If the Government claims that the one-

line paragraphs are by themselves the specific counts of the indictment, then each requires dismissal, since none incorporates any other allegation of the indictment.

The indictment here charges more than one offense per count. If paragraph 4 encompasses counts one through thirteen, if paragraph 6 encompasses counts fourteen through twenty-five, and if paragraph 8 encompasses counts twenty-six through thirty-two, then there are as many as thirteen offenses in one count.

B. The indictment fails to specify the action allegedly sought to be influenced in each case.

The section under which the indictment was drawn requires the showing of two necessary elements, to constitute an offense: (1) The action sought to be influenced: and (2) The manner of influencing, that is:

(a) The *making* of a false statement or report, knowingly;

(b) For the purpose of influencing action of a Federal Savings & Loan Association;

(c) Upon an application, advance, discount, purchase, etc.;

(d) By renewal, deferment of action or otherwise.

The indictment lacks both of these elements.

The District Court (Murphy, D.J.) found that the element of the manner of influencing was missing, but directed the prosecution to supply that element in a bill of particulars. The Government was so confused about that element

that it actually served two bills of particulars, one by mail on March 19, 1965, and the other, by hand, on March 23, 1965. Copies of these bills of particulars are annexed as Appendices E and F.

The indictment's failure to specify the action or rights sought to be affected by their claimed activities prevents the defendants from knowing what they have to meet and prevents the record from showing with accuracy to what extent they may thereafter plead a former acquittal or conviction. There are many actions the Bank might have been influenced by the petitioners to take; some might even be outside the scope of the statute; others might be any of the proper activities which have evolved in the banking world. No prohibited action is described in the indictment.

The indictment's failure to specify the action sought to be influenced and the manner of influencing permits the prosecution to claim the benefit of any one or more of the disjunctive possibilities; it requires petitioners to go to trial with the chief issue undefined; it will enable the prosecution to rest a conviction on one point and to seek an affirmance of a conviction on another; it will give the prosecution a free hand to fill in the gaps of proof by surmise or conjecture; and it will deprive the petitioners of notice and certainty as to what they are about to meet.

If counts one through thirteen are each to be prefaced by paragraph 4 of the indictment, if counts fourteen through twenty-five are to be prefaced by paragraph 6, and if counts twenty-six through thirty-two are to be pref-

aced by paragraph 8, the thirty-two counts would still fail to inform petitioners of the charge.

Paragraph 4 states that the defendants made a false statement "for the purpose of influencing the action of" the Association "upon an application for a mortgage". Paragraph 6 says that the defendants made false statements for the purpose of influencing "the action" "with respect to a mortgage loan". Paragraph 8 states that the defendants made false statements for the purpose of influencing "the action" of the Association "with respect to a mortgage loan".

A reading of the statute indicates that the "action", sought to be influenced in any way, is modified by the phrase, "by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor * * *". If that be the meaning of the state, then either renewal, deferment, acceptance, release or substitution of security, or otherwise must be pleaded (*U. S.* v. *Caril*, 105 U. S. 611, 26 L. Ed. 1135).

If the statute is not to be so read, it requires a reading that "action" has to be such as might adversely affect the interests of the organization or body sought to be influenced. Thus, the nature of the action should be pleaded (*U. S.* v. *Achtner*, 144 F. 2d 49; *United States* v. *Tandaric*, 152 F. 2d 3, 5).

Likewise, it is unlikely that the statute was intended to punish for influencing petty or minimal actions. It is basic that "if a meaning (of a statute) narrower than the

words is given by interpretation, an indictment simply in the statutory words will be ill; it must follow the narrower construction'' (*Bishop's New Criminal Procedure,* 2d ed. 1913, sec. 628, cited in *U. S.* v. *Weber,* 71 F. Supp. 88, 90).

There are many possible actions ''upon'' a mortgage loan, just as there are many possible actions ''with respect'' to a mortgage loan, which an Association may take. Among those which are ''upon'' the loan could be the acts of granting, denial, extension, renewal, modification, or the myriad of other possibilities evolved in the world of commerce.

When the statute speaks of ''influencing in any way the action'', it leaves each of these possibilities as a method of affecting the crime. Either the possibilities are set forth in the cited phrase of the statute (by renewal, etc.), or they are omitted from the statute and thus included disjunctively in the phrase ''in any way''. By failing to specify in the indictment the particular action sought to be influenced the pleader has put the Government in a position where it might claim the benefit of any of the disjunctive possibilities.

It was stated in *Ackley* v. *United States,* 8 Cir., 200 F. 217, 221:

> ''To recite that the defendant did the one thing or another makes the indictment bad for uncertainty.''

Such a pleading violates the Fifth and Sixth Amendments. The accused is not informed of the nature of the offense and cannot prepare his defense.

> "It may be conceded that an indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or another of several offenses, would be destitute of the necessary certainty, and would be wholly insufficient. It would be so for two reasons. It would not give the accused definite notice of the offense charged, and thus enable him to defend himself, and neither a conviction nor an acquittal could be pleaded in bar to a subsequent prosecution for one of the several offenses." (*In Re Confiscation Cases,* 87 U. S. 92, at page 104.)

If the Government knew what "action" was sought to be influenced it would seem simple to frame a proper indictment and it should have alleged it (*U. S.* v. *Simplet,* 192 F. Supp. 734, 737, cited with approval in *Russell* v. *U. S.,* 369 U. S. 749, 766).

The vice here is that some actions may be innocuous, albeit influenced by falsity, either unwittingly, incidentally or immaterially and the sufficiency of each count of an indictment

> "(M)ust be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading" (Sanborn, J., in *Fontana* v. *U. S.,* 262 F. 2d 283).

Where some actions sought to be influenced might be outside the scope of the statute, the pleader must set forth all the facts so that the Court (not the pleader) may determine whether they constitute a crime (*U. S.* v. *Hess,* 124 U. S. 483; *U. S.* v. *Fontana,* 262 F. 2d 283, 288; *U. S.* v. *Donovan,* 339 F. 2d 404, 407).

The Government, itself, as recently as March 19, 1965, took the position in its first bill of particulars (Appendix E) that the action sought to be influenced in the first thirteen counts of the indictment was to *forbear from and defer acceleration of payment on the mortgage loans.* Four days later, on March 23, 1965, the Government took the position that the action sought to be influenced in counts one through thirteen was inducing the Association to grant the mortgage loans applied for (Appendix F).

If the United States District Attorney, seven months after the indictment was filed, could not make up his mind as to what the Grand Jury intended by leaving the word "action" undefined, the petitioners surely cannot be expected to interpret the Grand Jury's meaning.

Certainly, it is not for the United States Attorney to amend or supply the meaning of a specification; it is for the Grand Jury (*Van Liew* v. *United States,* 321 F. 2d 664).

In *Russell* v. *United States,* 369 U. S. 749, this Court said:

> "A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of conviction to rest another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture."

The Grand Jury did not even pretend to follow the statute with regard to counts fourteen through thirty-two. Paragraphs 6 and 8 of the indictment speak of action "with respect" to mortgages. Title 18, Section 1014, does

not deal with actions "with respect" to mortgage loans. It deals with action "upon" mortgage loans.

It is obvious that the Association might take many actions "with respect" to a mortgage loan, such as changing the address at which payments might be made or even altering the name of the owner of the property covered, none of which could be construed as action "upon" the loan. All of it could be action "with respect" to the loan, and none of it obviously within the meaning or contemplation of the statute.

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used." (*U. S.* v. *Resnick,* 1936, 299 U. S. 207, 209, 57 S. Ct. 126, 127, 81 L. ed. 127, *U. S.* v. *Strauss,* CA 5, 1960, 285 F. 2d 953.)

See also:

United States v. *Cruikshank,* 92 U. S. 542.

C. The indictment is vague, indefinite and filled with such repugnancies as require its dismissal.

The allegations of the thirty-two one-line counts are merely dates, dates of application, purchase prices on applications (counts one to thirteen), dates of mortgages, dates of contracts and prices upon contracts (counts fourteen through twenty-five), dates of mortgages, dates of documents purporting to be credit reports, persons and salaries (counts twenty-six through thirty-two).

Paragraph 4 of the indictment starts with the phrase "On or about the dates hereinafter set forth". What the

"hereinafter" refers to appears nowhere. There are 24 dates set forth on page 3; dates from September 1, 1959 to March 1, 1960, are set forth on page 4, 24 other dates are set forth on the unnumbered page following page 4, dates from September 1, 1959 to March 1, 1960, are again set forth in paragraph 8; and finally 14 dates are set forth on the last page of the indictment.

Paragraph 4 adds to the confusion by speaking of "An application for a mortgage loan dated as hereinafter set forth." But nothing is specifically set forth thereafter.

Since the purpose of the charged falsity, alleged in paragraphs 4, 6 and 8, is claimed to be the influencing of action of the Association upon or with respect to loans granted on specific dates, it is apparent that if any false statement was made after the date of the granting of the mortgage it could not influence the action. If paragraph 6 is intended for counts fourteen through twenty-five, the date of the granting of the latest mortgage is February 3, 1960 (count fifteen). If defendants, as the Government might prove, made all of the false statements after February 3, 1960, and before March 1, 1960, there could have been no influencing of action or purpose of influencing action and, hence, no crime.

Count twenty is even more ludicrous. That alleges that a contract dated November 12, 1959 was submitted for the purpose of influencing a mortgage given two days earlier.

Similarly, with respect to counts twenty-six through thirty-two, if paragraph 8 were construed as alleging the

submission of false statements for the purpose of influencing the Association's actions with respect to the mortgages dated in the first column of those counts, the latest mortgage is alleged to be February 3, 1960 (count twenty-seven). Yet, the false statements are alleged to have been made thereafter until March 1, 1960.

Petitioners contend that paragraph 6 is not incorporated by reference in counts fourteen through twenty-five and that paragraph 8 is not incorporated by reference in counts twenty-six through thirty-two. If they were, they allege such repugnancies that the counts must be dismissed (27 Am. Jur. *Indictments and Information,* §110).

The practical application of this rule—that no allegation in an indictment can be treated as surplusage even if inconsistent with the offense charged—is that if an act, to constitute an offense, must take place at or before a given time, an allegation in the indictment which admits proof of a later time is repugnant to the charge and requires dismissal of the charge.

For instance, in *United States* v. *Richman,* 190 F. Supp. 889, 891, the defendant was charged with knowingly interfering with measures taken to safeguard the submarine U.S.S. Ethan Allen. One of the measures taken was an order restricting access to the launching area from 11 A.M. on November 22, 1960, until one hour after the launching which was scheduled at noon. The court held that the indictment was insufficient for the reasons, among others, that:

> "As the order is thus limited in time, a plain and definite statement of the essential facts constituting the

> offense should include an allegation that the defendants' entry into the restricted area occurred while it was subject to the order. The indictment, as written, would permit proof of entry into the area at any time within 72 hours. Such conduct, however, would not necessarily violate the order and the statute."

The case was cited with approval in *Russell* v. *United States,* 369 U. S. 749 and *United States* v. *Aarons,* 310 F. 2d 341.

So, in the case at bar, the Government has alleged, with respect to counts fourteen through thirty-two, that the acts took place up to March 1, 1960, a time when they could not have influenced the action of the Association, since the Government has also alleged that the latest action of the Association was completed by February 3, 1960.

Such allegations render those counts so repugnant that the defendants cannot meet the charge.

The Writ Should be Issued

It has been fairly estimated that the trial of this indictment will take more than 64 trial days, or more than 12 weeks. With interruptions, reasonably to be anticipated, the case may take as much as four months. The burden on the defense will be unduly heavy. It would be insupportable if convictions were to be had and the indictment thereafter dismissed for insufficiency on appeal.

Conviction of crimes under the section claimed may operate to forfeit the brokers' licenses of the petitioners and the F.H.A. authorizations which permit their activities

in the field of home loans, thus depriving the individual of his livelihood and the Company of its chartered purpose. If such convictions were thereafter reversed on appeal, the damage would be irreparable. To deny the writ under such circumstances and relegate petitioners to an appeal would be to exhaust "the prisoner rather than the * * * remedy" (*United States ex rel. King* v. *La Vallee,* 306 F. 2d 199, 203, 2 Cir. 1962, Friendly, J., concurring).

A writ of prohibition should be granted where, as in the case at bar, special circumstances are found to exist and where the withholding of the writ might work grave injustice (*Hartley Pen Co.* v. *United States,* 287 F. 2d 324, 328).

Courts have issued writs of prohibition to prevent wrongful prosecution in excess of a court's jurisdiction where the remedy of ultimate appeal from a conviction would not be adequate, as in the case at bar. (*Gladstein* v. *McLoughlin,* 230 F. 2d 762, 764; *Terrill* v. *Superior Court,* 6 Cal. 398, 60 P. 38; *Long Beach Federal Savings and Loan Association* v. *Federal Home Loan Bank Board,* 189 F. Supp. 589.)

Where, as in the case at bar, conviction of the crime sought to be charged carries with it immediate social and economic penalties which may not be recouped even after a successful appeal, where the trial of the indictment will take approximately three or more months, and where the expense will be extremely burdensome to the Government and especially to the defense, it would seem that such a situation calls for the exercise by this Court of that portion

of its appellate jurisdiction which may be employed by the use of the "all writs" section.

The prosecution of petitioners on this indictment violates the Fifth and Sixth Amendments to the Constitution, and the indictment is so defective that the District Court has no jurisdiction to try the case.

The orders of the District Court denying the motions to dismiss the indictment are not appealable until after conviction and petitioners have no other adequate remedy at law than the one here sought. As this Court said in *Berger* v. *United States,* 255 U. S. 22 at page 36:

> "The remedy by appeal is inadequate. It comes after trial and if prejudice exists it has worked its evil and a judgment of it in a reviewing tribunal is precarious."

Conclusion

The writ of certiorari should be granted, and the requested writ of prohibition should issue to prevent a lengthy, expensive and abortive trial on a defective indictment, and the indictment should be dismissed.

Dated: New York, New York
July 15, 1965

Respectfully submitted,

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